Supreme Court No. 80091-0
Court of Appeals No. 33647-2-II
Clark County No. 05-1-01064-8

STATE OF WASHINGTON,

Petitioner,

vs.

JESUS DAVID BUELNA-VALDEZ

Respondent.

Supplemental BRIEF OF RESPONDENT

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ORIGINAL

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A. QUESTION PRESENTED

Whether the ruling of the United States Supreme Court in *Gant v. Arizona*, 556 U.S.__(April 21, 2009), as applied to respondents' case, requires suppression of the evidence obtained during the search and dismissal of the prosecution.

B. ISSUES PERTAINING TO QUESTION PRESENTED

I. THE SEARCH OF THE VAN IN THIS CASE WAS UNLAWFUL UNDER BOTH THE FOURTH AMENDMENT AND ARTICLE 1, SECTION 7 OF THE WASHINGTON CONSTITUTION.

II. THERE IS NO OTHER EXCEPTION TO THE WARRANT REQUIREMENT THAT WOULD JUSTIFY THE SEARCH OF MR. BUELNA-VALDEZ'S VAN.

C. STATEMENT OF THE CASE

On May 10th, 2005 at approximately 7:45 p.m. Petitioner David Jesus Buelna-Valdez was stopped by Clark County Sheriff's Detective Tom Dennison while driving a Chevrolet Lumina minivan because one of his headlights was not illuminated. CP 38 (Finding of Fact #1). Detective Dennison discovered that there was an outstanding felony warrant for Mr. Buelna-Valdez's arrest. CP 39 (Finding of Fact #3). Mr. Buelna-Valdez was arrested and placed in the rear seat of a patrol car as an officer searched his van. CP 39 (Finding of Fact #4). Deputy Boyle was watching the passenger, co-Petitioner Reyes Ruiz, away from the car for

officer safety reasons while Detective Dennison searched the van. RP 10 (7-15-05).

During Detective Dennison's search of the van he noticed that an interior panel under the dash board was loose, as well as some of the door panels, and that the screws that would hold them in place were missing. RP 11 (7-15-05). The officers noticed that the panels were held in place with plastic, pushpin-type temporary screws that are typically used in automobile and boating applications. RP 11 (7-15-05). At that point, Detective Dennison announced that he felt something wasn't right, and Deputy Boyle suggested they call Deputy Ellithorpe and his narcotics dog, Eiko. RP 11 (7-15-06).

Deputy Ellithorpe and Eiko arrived at 8:20 p.m. CP 39 (Finding of Fact #5). First, Deputy Ellithorpe led Eiko on an external sweep of the vehicle. CP 40 (Finding of Fact #6). Eiko did not alert on the exterior of the van, nor did he alert on the dashboard or door panel areas of the minivan. RP 19-20 (7-15-06). The van had two rows of seats behind the driver and front passenger seats. CP 40 (Finding of Fact #7). Eiko alerted on a vent on the interior body panel on the driver's side of the van, near the second row of seats. CP 40, (Finding of Fact #7). Deputy Ellithorpe then removed Eiko from the van and began examining the panels in the area near the vent. CP 40 (Finding of Fact #7).

Deputy Ellithorpe found the vents to be secure, so he continued searching until he found a molded plastic cup holder which was loose toward the rear of the van. CP 40 (Finding of Fact #8). Deputy Ellithorpe then lifted the cup holder out of its foundation and observed a piece of insulation underneath where the cup holder had been. CP 40 (Finding of Fact #8). Ellithorpe then removed the insulation and saw two packages wrapped in plastic, lying in the space underneath the panel. Id. The contents of these packages later proved to be methamphetamine. CP 52 (Finding of Fact on Non-Jury Trial #10).

The trial court, in its conclusions of law on the motion to suppress, held the search of the van was lawful based exclusively on the doctrine of search incident to arrest. The trial court made no ruling as whether any other exception to the warrant requirement would have justified this search, and no other basis was proffered by the State.

D. ARGUMENT

I. THE SEARCH OF THE VAN IN THIS CASE WAS UNLAWFUL UNDER BOTH THE FOURTH AMENDMENT AND ARTICLE 1, SECTION 7 OF THE WASHINGTON CONSTITUTION.

Until recently, a search of a car incident to a valid arrest was a well recognized exception to the warrant requirement of the Fourth Amendment. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034 (1969);

United States v. Vasey, 834 F.2d 782 (1987); *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986). In *Chimel*, the United States Supreme Court ruled that incident to a lawful arrest, officers may search the area of the arrestee's wingspan, meaning the area into which a suspect might reach a weapon or evidence. *Chimel* at 762-63; *Vasey* at 787. In *New York v. Belton*, 453 U.S. 454, 460, 101 S.Ct. 2860 (1981), the United States Supreme Court, based on the rather unfair assumption that officers in the field lacked the ability to make very simple determinations about what areas are within an arrestee's reach and which areas are not, established a rule that when officers search an automobile incident to arrest, they may search the entire passenger compartment of the automobile and any containers found within the passenger compartment, without regard to an arrestee's *actual* ability to reach the areas or items searched.

In *State v. Stroud*, 106 Wn.2d 144, 151, 720 P.2d 436 (1986), the Washington State Supreme Court, applying Article 1, Section 7 of the Washington State Constitution held that officers in this state may search the entire passenger compartment of a vehicle incident to the lawful arrest of an occupant of that vehicle. Although the rationale behind this rule was that an arrestee may reach for a weapon, thereby putting an officer at risk, or reach evidence that he may destroy, thereby justifying the search, this rationale was a legal fiction because the search could occur even if the

arrested subject was already secured and in the custody of the police. The *Stroud* court, like the *Belton* court, reasoned that officers in the field were incapable of identifying obvious exigencies and determined that a bright line rule was required, even though it came at the expense of individual rights. *Stroud* at 151. The *Stroud* court departed from the *Belton* court, however, by ruling that only the passenger compartment and unlocked containers may be searched, as opposed to locked containers. *Stroud* at 151-52.

In *Gant v. Arizona* 556 U.S.__ (2009) the United States Supreme Court finally recognized the legal fiction of *Belton* and held that a search of a vehicle incident to arrest must *actually* be based on a reasonable belief that the arrestee might access the interior of the vehicle while the search is occurring or that the search might yield evidence of the crime for which the arrestee was arrested. In the case at bar, neither of those two conditions is present. At the time of both the initial search and the second, non-contemporaneous search in which the interior of the car was largely dismantled, Mr. Buelna-Valdez was handcuffed and seated in the back of a police car and Mr. Ruiz was standing away from the vehicle under the watchful eye and detention of another officer. Further, Mr. Buelna-Valdez was arrested based upon a felony warrant and there has been no suggestion at any time by the State that the officers believed they could find evidence

related to the underlying alleged crime for which the warrant was issued during this search. Under *Gant,* the search of this van cannot be justified as a search incident to arrest.

II. THERE IS NO OTHER EXCEPTION TO THE WARRANT REQUIREMENT THAT WOULD JUSTIFY THE SEARCH OF MR. BUELNA-VALDEZ'S VAN.

At the outset it must be noted that the search of this van would have been justified if based upon Mr. Buelna-Valdez's consent but it was not, nor has the State ever suggested it was. It must also be noted that the evidence discovered during the search of this van was not in plain view.

It is anticipated that in response to *Gant v. Arizona* the impoundment of vehicles will now become standard operating procedure in the event of the arrest of a driver. It is further anticipated that in cases currently on direct appeal, the State will argue that the inevitable discovery doctrine should save the cases where evidence was obtained during the search of a vehicle incident to arrest because of the authority of officers to impound vehicles.

The doctrine of inevitable discovery, which has never been officially adopted by this Court[1], is *not* an exception to the warrant requirement but an exception to the exclusionary rule of the Fourth Amendment.

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[1] *State v. O'Neill*, 148 Wn.2d 564, 592, 62 P.3d 489 (2003), n.11.

This Court has consistently refused to recognize any exception whatsoever to the exclusionary rule of Article I, § 7. In *State v. White* this Court held:

> The language of [Article I, § 7] constitutes a mandate that the right to privacy shall not be diminished by the gloss of a selectively applied exclusionary remedy. In other words, the emphasis is on protecting personal rights rather than curbing governmental actions.

State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). "*Whenever* the right is unreasonably violated, the remedy *must* follow." (Emphasis in original.) *Id.*; *State v. Boland*, 115 Wn.2d 571, 582, 800 P.2d 1112 (1990); see also, *State v. Young*, 123 Wn.2d 173, 196, 867 P.2d 593 (1994); *In re the Personal Restraint of Maxfield*, 133 Wn.2d 332, 343, 945 P.2d 196 (1997); *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999); *State v. Barker*, 143 Wn.2d 915, 922, 25 P.3d 423 (2001).

White, and its view that Article I, § 7 requires an automatic exclusionary remedy, was entirely consistent with long-established cases. S. Pitler, Washington Law Review, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 Wash. L. Rev. 459, 474-80 (1986).The Supreme Court first recognized the Washington Constitution's requirement of exclusion in *State v. Gibbons*, 118 Wash. 171, 184, 203 P. 390 (1922). The Court continued to apply this state remedy until the

early-1960s when *Mapp v. Ohio* found the Fourteenth Amendment made the federal rule applicable in state courts. Pitler, at 486, citing, *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Following *Mapp*, the Washington Courts began applying the federal rule without mention of the state rule. The Court's decisions in that period relied entirely on the Fourth Amendment without mention of Article I, § 7. These cases did not repudiate the independent nature of the Washington exclusionary rule, they simply ignored it.

White then ended this roughly 20-year period with the Court's return to the independent and more protective state exclusionary rule. *White* was followed in quick succession by a string of decisions reaffirming the broader protections of Article I, § 7. Pitler, at 493-96. The independent and automatic nature of the Washington exclusionary rule is thus long-established, and has been consistently relied upon by this Court in the 24 years following *White*.

In *State v. O'Neill*, this Court stated that inevitable discovery has not been recognized as an exception to the exclusionary rule under Article I, § 7. *State v. O'Neill*, 148 Wn.2d 564, 592, 62 P.3d 489 (2003), n.11. The Washington Court of Appeals, however, has recognized inevitable discovery as an exception to the exclusionary rule under Article I, § 7. See *State v. Richman*, 85 Wn.App. 568, 933 P.2d 1088 (1997); *State v.*

Winterstein, 140 Wn.App. 676, 166 P.3d 1242 (2007); *review granted* 163 Wn.2d 1033, 187 P.3d 269 (2008). This Court held *State v. Warner*, 125 Wn.2d 876, 889 P.2d 479 (1995) that inevitable discovery is an exception to the exclusionary rule under the 5th Amendment of the United States Constitution and relied entirely upon federal case law. *Warner* at 888.

This Court should decline to hold that inevitable discovery is an exception to the exclusionary rule of Article I, § 7. Inevitable discovery, unlike the independent source doctrine, only presents itself in the face of an illegal governmental act. The inevitable discovery rule requires a reviewing court to engage in pure speculation as to what *might* have happened absent illegal conduct, and will encourage "post hoc rationalizations" for police misconduct. It is all too easy to rely on hindsight when considering the question of whether or not to exclude evidence after the fact—both after we know of its existence and relevance, and after the State has had an opportunity to construct a description of how the hypothetical investigation might have occurred.

The inevitable discovery rule is often conflated by the State with the independent source doctrine, which is entirely different. The independent source doctrine presents itself when the same evidence is *actually* obtained in two different and independent ways, one legal and one illegal. For example, one officer Mirandizes a suspect who

voluntarily discloses the location of a body, while another officer tortures his accomplice who discloses exactly the same information. The legally obtained information is not tainted by the illegally obtained information that was gathered independent of it, and does not offend Article I, § 7. This cannot be compared to evidence that was obtained *only* by unlawful means, as implicated in the inevitable discovery context. "The inevitable discovery exception necessarily implicates a hypothetical finding that differs in kind from the factual finding that precedes application of the independent source rule." *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501 (1984) (Brennan, J., dissenting).

Adopting an inevitable discovery exception to the exclusionary rule of Article I, § 7 goes against the rich, independent tradition of protection of individual liberties in the State of Washington. Petitioner Buelna-Valdez respectfully requests this Court decline to do so in an effort to sanitize the innumerable cases now affected by the holding of *Gant v. Arizona*. In this case, the Court need not consider whether this evidence could have lawfully been recovered during an inventory search following a vehicle impound if it declines to adopt an inevitable discovery exception to the exclusionary rule. Should this Court decide, however, to adopt an inevitable discovery exception to the exclusionary rule, it nevertheless should not help the State in the case at bar for the reasons set forth below.

RCW 46.55.113 provides authorization for the impoundment of vehicles. Under subsection (1), a vehicle is subject to "summary impoundment" at the direction of the officer pursuant to the terms and conditions of an applicable local ordinance or state agency rule if the driver is arrested for violating RCW 46.61.502, 46.61.504, 46.20.342 or 46.20.345.[2] Subsection (1) plainly does not apply to this case.

Under subsection (2) of RCW 46.55.113, an officer may take custody of a vehicle, at his or her discretion, under certain enumerated circumstances, to include when a driver of a vehicle is arrested and taken into custody by a police officer (see RCW 46.55.113 (2) (d)).

Impoundment of a vehicle is a seizure under Article I, Section 7 of the Washington State Constitution because it involves the governmental taking of a vehicle into its exclusive custody. *State v. Peterson*, 92 Wn.App. 899, 902, 964 P.2d 1231 (1998). All seizures must be reasonable. *Id.*, citing *State v. White*, 97 Wn.2d 92, 109-110, 640 P.2d 1061 (1982). Impoundment is inappropriate when reasonable alternatives exist. *State v. Hill*, 68 Wn.App. 300, 306, 842 P.2d 996 (1993); *State v. Greenway*, 15 Wn.App. 216, 219, 547 P.2d 1231, *review denied*, 87 Wn.2d 1009 (1976). An officer is not required to exhaust all possible alternatives to impoundment. *Hill* at 306. However, the controlling cases

[2] The term "summary impoundment" was added to this statute in 2003, presumably in response to *In re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 60 P.3d 53 (2002).

clearly hold that an officer must take certain minimum steps in order to establish the reasonableness of an impoundment. Prior to impoundment, the officer must show that he at least considered alternatives and attempted, if feasible, to get from the driver the name of someone in the vicinity who could move the vehicle. *Hill* at 307, *State v. Coss*, 87 Wn.App. 891, 899, 943 P.2d 1126 (1997); *Peterson* at 903. He then must have "reasonably concluded from his deliberation that impoundment was in order." *Hill* at 307.

In *State v. Peterson*, cited above, the impoundment was held to reasonable because the driver had no passengers and he was not the owner of the vehicle. The Court noted that the owner of the vehicle was not present to authorize any arrangement other than impoundment. *Peterson* at 903. In *State v. Coss*, the impoundment was held unreasonable because there were passengers present and the officer made no attempt to ascertain whether one of them was able to take remove the vehicle.

An inventory search cannot serve as a pretext for an investigative search for evidence. *State v. Singleton*, 9 Wn.App. 327, 511 P.2d (1973); *State v. Houser*, 95 Wn.2d 143, 155, 622 P.2d 1218 (1980); *State v. Ferguson*, 131 Wn.App. 694, 128 P.3d 1271 (2006).

An inventory search following impoundment is limited in its permissible scope. *Houser*, supra, at 154; *Ferguson*, supra, at 703. The

purpose of an inventory search is to find, list, and secure the personal property of the detained party from theft or damage, to protect the police and temporary storage bailees from liability due to dishonest claims of theft, and to the police and the public from dangerous or hazardous substances. *Houser* at 154, 158; *Ferguson* at 703. In *Houser*, the Court held that an officer may not enter and examine the locked trunk of an impounded vehicle absent a manifest necessity (e.g. a rolling methamphetamine laboratory as was the case in *Ferguson*). *Houser* at 156. The *Houser* Court further held that where a closed piece of luggage in a vehicle bears no indication that it contains dangerous contents and officer cannot search the luggage in the course of an inventory search absent the owner's consent. *Houser* at 158.

In the case at bar, the search of this van cannot be justified on the basis that the evidence would have been found pursuant to an inventory search after a lawful impound. First, the State bears the burden to prove that the impoundment would have been lawful and bears the burden of proving the inventory search would have been reasonable. *Ferguson* at 703. Here, because impoundment would have fallen under subsection (2) of RCW 46.55.113 rather than subsection (1), the impoundment of this case would have been discretionary rather than summarily authorized, and the State would have had to establish that reasonable alternatives to

impoundment were explored and did not exist. The State cannot meet this burden. Second, the scope of this search exceeded the permissible scope of an inventory search, just as it exceeded the proper scope of a search incident to arrest (previously argued to this Court and the Court of Appeals). The contraband was found in a void behind a panel near the second row of seats in the back of the van. There was no danger that this contraband would have been stolen (much less found), nor any danger that Mr. Buelna-Valdez would make a false claim that the police stole this contraband after seizing his car. As argued previously in this case, the area where this contraband was found was tantamount to a locked container. Last, the contraband did not pose any immediate or discernible danger to the police or to the public. This contraband is distinguishable from the contraband found in *Ferguson*, which were materials suggestive of a rolling methamphetamine laboratory contained within the trunk. Such materials are highly toxic and inflammatory. Such is not the case here.

This Court should decline to enter the morass of guessing whether the State would have been able to lawfully impound this vehicle and whether the material would have been found during an inventory search (in other words, inevitable discovery). Further, even if this Court were to conclude based upon the record before it that impoundment of this vehicle would have been lawful and the contraband would have been discovered

during a subsequent inventory search, the inventory search would have been unconstitutional because it would have exceeded the permissible scope of an inventory search.

E. CONCLUSION

All evidence discovered pursuant to the searches must be suppressed. If the evidence of the drugs is suppressed, the State presented insufficient evidence to convict Mr. Buelna-Valdez of any crime. His conviction should be reversed and dismissed.

RESPECTFULLY SUBMITTED this 18th day of May, 2009.

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